IN THE

Supreme Court of the United States.

October Term, 1903.

No. 65.

JACOB GERTGENS, PLAINTIFF IN ERROR,

vs.

JOHN P. O'CONNOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Reply Brief for Plaintiff in Error.

In reply to the two briefs filed by defendant in error, as well as to points made in the oral argument, we submit the following by leave of the court:

I.

Speculative Purpose of Ireland.

Counsel for defendant in error, in answer to our statement that Ireland's agreement with the railroad company was intended by him as a speculation, and that he did not want to purchase any

lands which he could not sell at a profit, contended that his whole purpose was philanthropic and to settle up the country with members of his church, and in no sense for gain; that he had benefited or helped them was the reason why he wanted to get the title in his own name.

The record shows (p. 16) that Ireland applied to purchase 22,560.44 acres of land, covered by his two contracts embracing the land in controversy. It also shows by the admission of O'Connor, the defendant in error (p. 35), at the Ireland hearing in the land department, that he had purchased of Ireland 7,700 acres of the land embraced in his application, equal to 48½ quarter-sections and more than one-third of all the lands Ireland sought to purchase, and yet he never settled upon any of the lands or put a dollar's worth of improvements upon them. He also refused to exhibit his contracts, or any of them, at the hearing (Rec., p. 37). This is a sufficient answer to their contention that Ireland settled up the country.

The record also shows that Ireland introduced in his behalf a contract he had made with one Tyler, constituting him an agent to sell another large portion of the lands at not less than $6 an acre (except by consent of both parties), which had not been sold at the close of the hearing or it would have been so shown. (Rec., pp. 29 and 30.) He also strenuously insisted upon his right to purchase all the land for which he had made contracts under his agreement of 1880, wherein, as held by

the land department, he was simply acting as the agent of the company, and he was denied the right to purchase them.

Neither can it be contended that his application to purchase these lands was on behalf of the persons with whom he had made contracts, or was in any manner an act of kindness to them; but, on the contrary, they could all have made homestead entry of their lands and obtained title free, instead of having to pay Ireland from $4 per acre up. It must not be forgotten either that these contracts were made upon the understanding that he was to pay the company $4 an acre less ten per cent. his commission for selling the lands, but as it did not get title, he was permitted to buy from the Government under the act of 1887 at only $1.25 per acre. So it will be seen that, instead of aiding the settlers to get title, he prevented them from getting title from the Government and compelled them to pay him the amounts specified in their contracts, which were made upon the basis that he was to pay $4 instead of $1.25 per acre. Hence, it will be seen, it was only O'Connor and men like him *who were not settlers, and Ireland himself* who were benefited by his application to purchase.

II.

Initiation of Homestead Claims by Settlement.

The following assertion in the first brief filed by defendant in error, found at page 18, deserves notice:

> "Counsel for plaintiff in error contend that there is a rule of the land department with reference to the public lands to the effect that an intending settler, by mere occupancy, may acquire a vested right in land *not subject to entry*. We know of no such rule, and this court has decided that occupancy without entry, made or offered, confers no right whatever. (Northern Pacific R. R. Co. *vs.* Colburn, 164 U. S., 383, and Nelson *vs.* Ry. Co. 188 U. S., 108.")

It is sufficient to say that this proposition was urged in the dissenting opinion in the Nelson case, but held adversely by the decision. It is true that, in the Nelson case, the land was unsurveyed, but the rule is the same, whether surveyed or unsurveyed. The language of the 3d section of the act of May 14, 1880, in specific terms includes both classes of lands. This has been the ruling of the land department since the decision of Secretary Teller in the case of the Southern Pac. Ry. Co. *vs.* Lopez (3 L. D., 130), decided October 2, 1884.

This decision is followed in the case of Tobias Beckner (6 L. D., 134), and the following quotation made from Secretary Teller's decision, above referred to.

Secretary Teller, commenting upon the act of May 14, 1880, said:

> "This act introduced several new features into the homestead law, and, among others, *the initiation of a homestead claim by settlement, whether the land is surveyed or unsurveyed.*"

The Secretary follows this quotation with his opinion, as follows:

> "The act of May 14, 1880, was an enobling or enlarging statute, remedial in its nature, granting larger powers, rights, and privileges to the settlers than was embraced in the original act. The sole purpose and object of the 3d section of said act was to provide for the initiation of a homestead right by settlement, whether upon surveyed or *unsurveyed* lands, and the settler is protected in this inchoate right against every one else except the Government."

These cases are followed by the cases of E. S. Newman, 88 L. D., 448; Preston B. Howard, 8 L. D., 286, and other cases, and the doctrine decided is disputed in no case.

We do not contend that the claim of the plaintiff in error falls within the terms of either of the provisos of the 5th section of the act of March 3, 1887. If it did, his right would be superior to Ireland's, however valid his purchase, since all lands falling within their terms are expressly excluded from the operation of that act. But we do insist *his right to the land attached immediately* upon the *revocation of the withdrawal*, whether that took place September 29, 1890, the date of the repealing act, or May 22, 1891, the date the Secretary promulgated that repeal. It is not at all material to his case which. And that, as against the whole world, his claim to the land is good, provided he can show Ireland had no legal right to purchase the land under his pretended contract.

There is also a line of cases holding that settlers may acquire rights to lands by settlement, which are not *open to entry*, because covered by another entry or by a railroad selection.

These decisions begin with the case of Geer *vs.* Farrington (4 L. D., 410), decided by Secretary Lamar March 3, 1886, and that case is followed by the cases of—

Gudmundson *vs.* Morgan, 5 L. D., 147; Houf *vs.* Gilbert, Ibid, 238; Wiley *vs.* Raymond, 6 L. D., 248; Austin *vs.* Thomas, Ibid, 833; Tarr *vs.* Burnham, Ibid, 709, decided by Secretary Vilas May 2, 1888; Rothwell *vs.* Crockett, 9 L. D., 89; Pool *vs.* Moloughney, 11 L. D., 197; Etnier *vs.* Zook, Ibid, 452; Smith *vs.* Place, 13 L. D., 214; Kruger *vs.* Dumbolton, 7 L. D., 212; Stone *vs.* Cowles, 14 L. D., 90; McInnis *vs.* Cotter, 15 L. D., 583; Lough *vs.* Ogden, 17 L. D., 171; Neal *vs.* Cooley, 18 L. D., 3; Davidson *vs.* Gelinas, Ibid, 392; McMichael *vs.* Murphy, 20 L. D., 147; Hunter *vs.* Blodgett, Ibid, 452; Giles *vs.* Troop, 25 L. D., 448; H. & D. Ry. Co. *vs.* Arnold, 26 L. D., 538; Hanson *vs.* Roneson, 27. L. D., 382, and Olson *vs.* Hagerman, 29 L. D., 125.

The case of Tarr *vs.* Burnham, above cited, was the first case in which the department applied the same principle to land covered by a railroad withdrawal as it had been applying to land embraced in an uncancelled entry, citing the original case of Geer *vs.* Farrington, *supra*, decided by Secretary Lamar.

These decisions are to the effect that while a settler upon land withdrawn or covered by a prior entry acquires no rights against the United States or the corporation for which the withdrawal was made, or the record entryman, as the case may be, yet as against all other adverse claimants, his rights attach *eo instanti* upon the revocation or cancellation of the withdrawal or entry, to the exclusion of all claimants who cannot show a better title.

The doctrine laid down by these cases was clearly stated by Secretary Chandler in the case of Pool *vs.* Moloughney, *supra*, decided August 20, 1890, as follows:

> "The department has repeatedly held that, where land had been covered by a homestead or other entry that was afterwards cancelled, settlement upon the tract prior to such cancellation, especially if attended by the possession and ownership of valuable improvements, whether made or purchased, was sufficient to constitute a legal claim that would attach to the land the instant it become again a part of the public domain. See McAvinney *vs.* McNamara, 3 L. D., 552; Millis *vs.* Burge, 4 L. D., 446; Cathran *vs.* Davis, 5 L. D., 249; Wiley *vs.* Raymond, 6 L. D., 246; Kruger *vs.* Dumbolton, 7 L. D., 212. The same rule has been applied where land has been withdrawn for the benefit of a railroad company. See Peterson *vs.* Kitchen, 20 L. D., 181; Houf *vs.* Gilbert, 5 L. D., 239."

III.

As to the proposition that the mere presentation of Ireland's application to be allowed to purchase under the 5th section of the act of March 3, 1887, being such a disposition of the land as to preclude the consideration of that of Gertgens and other homestead settlers whose appeals from the rejection of their applications to purchase were pending in the land office when Ireland was notified he could come forward and make his publication and proof, it is so abundantly contradicted by the record that it shou'd not be necessary to discuss it.

The mere fact that in this same letter (Record, p. 104), in which the local officers are so told, they were instructed by the Commissioner to inform Ireland that in addition to the usual published notice that "he must be careful that all parties now known (Gertgens and all these settlers whose appeals are pending), or who may become known before the closing of the case before them, to be *adverse claimants* to any of said lands are *given special notice thereof*." Why should they be given special notice if, as contended, the land had been already disposed of to Ireland? In point of fact, they did come in and make defense and followed up their defense to the final decision by the Secretary, and no one ever had the temerity to suggest to the land department that these settlers were barred from acquiring any rights or presenting their claims because of the assertion of Ireland's claim, or of the statements in the

Commissioner's orders that no disposition of these lands should be made until all of these claims were adjudicated by him. Such a position would have met with ridicule only by the land department and found its first announcement in the Minnesota court in this case.

IV.

The Contract.

In addition to the authorities cited in our original brief, as to the invalidity of Ireland's option agreement, without consideration or mutuality of engagement, we invite the further attention of the court to the two cases which were mentioned in the oral argument and not dwelt upon for lack of time.

The case of W. S. Campbell *vs.* A. Lambert & Co., (36 La. Ann., 35), is stated in the syllabus as follows:

> "An agreement by which one party engaged to deliver to the other such quantities of coal as the latter may require during the year 'to the extent of sixty thousand bushels with privileges of twenty thousand more' at a stipulated price, but containing no obligation on the part of the latter to take or pay for any stipulated quantity is a *nudum pactum* from the performance of which the promisor may at any time withdraw. One promise may be a good consideration for another promise, but there must be a mutuality of engagement."

In the opinion the court said :

> "But on plaintiffs, own theory, it is manifest that the agreement is a *nudum pactum*. We scan its provisions in vain to find the imposition on Campbell of any obligation to take or pay for any amount of coal whatever. He undertakes nothing except to pay, at the end of each month, for such coal as he may have chosen to order. One promise may be a good consideration for another promise, but not unless there is an absolute mutuality of engagement so that each party has the right at once to hold the other to a positive agreement." 1 Parsons Cont., p. 448.

After quoting from Burnett *vs.* Bisco, 4 Johns., 235; Bran *vs.* Burbank, 16 Me., 458; Mers *vs.* Franklin, 68 Mo., 127, and Houston *vs.* Mitchell, 38 Texas, 85, the court say :

> "If the condition upon which defendant's promise was to take effect had been the doing of something involving labor or other value by Campbell, and upon the faith of said promise and before its revocation, Campbell had done the thing, different principles would apply, not necessary to specify here. But the foregoing cases sufficiently show that the mere exercise of an option to exact the performance of a promise, does not alter the situation of the parties and does not prevent the promisor from exercising his right of refusal.
>
> The authorities quoted are sound and applicable to our law.
>
> On these grounds we hold that defendants were not bound in law to execute the naked promise contained in their agreement, but had

the right, at any time, to refuse to proceed in execution thereof, and for such refusal, are not responsible in damages to plaintiff."

The case of Joseph Rafoloritz *vs.* The American Tobacco Co. (73 Hun. N Y., 87), decided by Mr. Justice Parker is thus stated by the court:

"On or about the 10th day of April, 1892, the defendant and Joseph Rafoloritz and Son * * * entered into an agreement or contract whereby and wherein the defendant promised and agreed, in consideration that said Joseph Rafoloritz and Son would purchase and sell a certain cigarette manufactured by defendant, that he, the defendant, would allow and pay them as a compensation or commission for said purchase of cigarettes twenty cents on every thousand of said cigarettes manufactured by defendant and purchased by said Joseph Rafoloritz and Son, between the 10th day of April and the 1st day of October, 1892. It seems that Joseph Rafoloritz and Son did thereafter purchase nearly 200,000 cigarettes, upon which purchase the defendant paid the promised commissions. Then it refused to sell plaintiff any more cigarettes, hence this action. The court held that there was no mutuality of contract, and, therefore, not enforcible. That it would have been otherwise had the plaintiff found himself to have purchased a given quantity of cigarettes.

That under the agreement, as alleged, it was optional with the plaintiff to purchase cigarettes or not. If, after making it, he had refused to take any, or after taking a few thousand, had declined to purchase others,

the defendant could not have compelled him either to take cigarettes or respond in damages for not doing so. And as he made no promise there was no basis for a consideration for the promise of the other party to the alleged agreement. In support of such position the court cited Chicago and Great Eastern Ry. Co. *vs.* Dane (43 N. Y., 240), and Hurd *vs.* Gill (45 N. Y., 341)."

The judgment of the lower court was affirmed.

Supplemental Brief for Defendant in Error.

We do not deem it necessary to reply to the arguments in the supplemental brief filed by defendant in error as to the terms of the grant of 1857, since the land was not required to be withdrawn by that act, was not withdrawn under it, but under the 4th section of the act of March 3, 1865, as uniformly held by the land department and fully recognized by Congress in the repealing statutes of September 29, 1890, as well as by the decision of Secretary Noble. (Rec., p. 90).

The land is not within the granted limits of the acts of 1857, 1864, or 1865, and of course there was no absolute grant of lands in indemnity limits under the act of 1857 any more than under any other of the grants made.

Another point which we will notice is the proposition that plaintiff in error, who seeks equity, does not offer to do equity by returning to O'Connor the amount paid to the United States for the land, to wit, $1.25 per acre.

It is only necessary to say that he did not pay it to or at the instance of plaintiff in error, neither did he receive the benefit of it, or could he receive any benefit, as if successful he will enter the land under the homestead laws.

Again, defendant in error must look to the United States, under the repayment statutes, for the refunding to him of the amount paid them. The Government received his money, and if it failed to make a valid title to him for the lands which properly belonged to plaintiff in error, it is difficult for us to see any good reason why he should pay or tender the amount to defendant in error.

Referring to the paragraph in the stipulation filed at the hearing in the land department (Rec., pp. 38 and 39), read by counsel in oral argument, to the effect that parties acted under advice of counsel, &c., it will be observed this paragraph, by its terms, applies only to those protestants who had made contracts with Ireland, and not to the plaintiff in error, who made no contract. It was a general stipulation, covering several classes of claimants, and was so drawn as to cover the different cases.

There is absolutely nothing in the record to show that plaintiff in error had any knowledge whatever of Ireland's claim until he was specially notified to appear at the hearing upon Ireland's application to purchase. Neither is there anything in the record showing that any improvements whatever were ever made upon any of the lands

embraced in his application under his 1883 contract by Ireland or any one holding a contract under him.

In answer to an inquiry made by Mr. Justice White, during the oral argument, whether, under such a contract as Ireland's 1883 contract, if he had gone upon the land and made improvements, that would have been a sufficient consideration, we beg to call attention to the decision of the Supreme Court of Colorado, in the case of Gorden *vs.* Darnell, 5 Colo., 303, quoted from in our original brief at pp. 72 and 73, holding that such expenditures not having been required by the agreement, are merely voluntary, and furnish no consideration for the option. We also invite attention to the cases referred to in that decision.

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